the bottom of the notice. The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under clause 1, the guarantors are to pay "on demand all money which now is or may during the continuance of the agreement be owing to you from the Customer(s) . . . . . ". Clause 4 requires the sum guaranteed or any balance thereof to be paid with interest from the date of demand for the payment thereof. It is also stipulated at clause 11 that any demand in relation to matters aforesaid may be effectively given or made by any officer of the Bank, either served personally on the guarantors, or sent by post to or at their last known place of business. (See *Bradford Old Bank Ltd.* v. *Sutcliffe*[2]). Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor. (See *Paget's* Law of Banking, 9th Edition, 522).

For the above reasons, we hold that no proper demand was made by the respondent from the appellants, and accordingly allowed the appeal with costs.

Appeal allowed.

Solicitors: *Skrine & Co.; Lovelace & Hastings.*

TRUSTEES OF LEONG SAN TONG KHOO KONGSI (PENANG) REGISTERED & ORS. v. POH SWEE SIANG

[S.C. (G. Seah, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) September 29, December 1, 2 & 3 1986 & April 27 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 117 of 1986]

Landlord and Tenant – Tenancy over vegetable plots and over premises – Whether premises controlled premises – Termination of tenancy – Whether notices to quit valid – Whether any estoppel created – Tenant a trespasser after expiry of notice to quit – Common law remedy of self-help available to landlord – Use of no more force than is reasonably necessary – Damages for any injury caused – Whether exemplary damages may be ordered – Counterclaim by landlord for damages – Cross-appeal – Costs – Specific Relief Act, 1950, ss. 7 and 8 – Control of Rent Act 1966 – Civil Law Act, 1956, s.28(4)(a).

The first appellants were the registered proprietors of the Thean Teik Estate in Penang. They had executed an agreement with the second appellant a housing developer to build houses on the estate for sale to the public. The third appellants were the contractors of the housing developer. The land concerned had been occupied by farmers who claimed to be tenants of the vegetable plots and the respondent was one of them. In the agreement between the trustees of the estate of Thean Teik and the developer it was agreed that the developer shall have the right to enter upon the land to carry out site preparation and survey and all other matters connected thereto including the eviction of squatters which shall be done at the developer's own expenses. Any compensation payable to the squatters was to be borne entirely by the developer but the trustees of the estate would assist the developer in legal proceedings against the squatters. The trustees had given two notices to quit to the respondent, one to quit the land and the other to quit and give up possession of the house on the land.

The respondent testified that a group of people from the second appellant's company came to the land on the October 27, 1982 and they started to demolish the vegetable plots which they unearthed and flattened. In the process they also destroyed pipes for watering the vegetable. The following day the people came again and the work of flattening the vegetable plots continued. According to the respondent three acres of his vegetable plots were flattened where he had planted brinjals which were fruiting but not yet harvested.

In the action brought by the respondent he alleged that he had been a registered tenant of approximately six acres of land in the estate since May 22, 1950, when he bought a farm and house on the estate. He became a tenant upon payment of a sum of $5/- whereupon he was registered by the trustees of the estate as a tenant. He also alleged that the first appellant orally promised him that he could stay on the land as long as he continued to pay the rent to the first appellant and he was induced into believing that he could develop the estate as he saw fit. Finally he claimed that the notices to quit to terminate the tenancy of the vegetable plots and the tenancy of the land on which the house stands are invalid and ineffective and that he is at all material times entitled to possession of the said land.

There was a lengthy trial before the learned Judge which lasted for 25 days over a period of 11 months. The learned Judge held that the plaintiff-respondent was entitled to damages for trespass and he made the following orders –

1) The defendants to pay the plaintiff by way of specific damages $42,000 for the loss of the sprinkler system, the pigsty, the chicken coop and the attap hut and a sum of $135,000 for the loss of vegetable produce on 2 acres of land for 3 years and 9 months at the rate of $3,000 per month.

2) The defendants to pay a sum of $150,000 to the plaintiff as damages for trespass.

3) The defendant's counterclaim for possession of the six acres of vegetable land is allowed.

4) The plaintiff to give up vacant possession of the six acres of land and to dismantle and remove his double storey house together with all the farm buildings which he has built on the land by July 31, 1986.

The appellants appealed and the respondent also counter-appealed.

Held: (1) the learned Judge was right in holding that that there was not enough evidence to base a conclusion on the balance of probability that the house was built before January 31, 1948 for the Control of Rent Act 1966 to apply;

(2) the notices to quit in respect of the vegetable plot and in respect of the house were valid and sufficient to terminate the tenancies;

(3) in this case no estoppel whether proprietory or equitable was created;

(4) on the expiry of the period specified in the notices and the landlord showing an intention to repossess the respondent became a trespasser on the land. The appellants as landlord could then enter the land to evict the tenant using no more force than necessary to achieve the object;

(5) section 7 of the Specific Relief Act, 1950, does not exclude the common law remedy of self-help, which is a remedy which is always available unless expressly excluded;

(6) in this case there can be no trespass on the land by the appellants and there can be no damages for forcible entry as such. Although no rights of the respondent had been infringed by the forcible entry of the land by the appellant using no more force than was necessary to achieve the object, the respondent would be entitled to the payment of damages if any injury had been sustained by him for which he could be entitled to compensation in damages;

(7) in other words the respondent cannot recover damages for the forcible entry but he can recover damages for the destruction of his property by the action of the appellants or their agents which went beyond what was necessary to effect re-possession;

(8) in this case damages would be awarded for the loss of the sprinkler system amounting to $20,000 and the loss of three acres of vegetable crops amounting to $3000-00. The award for damages for trespass by the learned judge should be set aside;

(9) the award for exemplary damages by the learned judge was misconceived and should be set aside. The conduct of the appellants may have exceeded the bounds of peaceble entry but cannot in the circumstances be described as a reprehensible conduct or contumelious disregard of the respondent's rights;

(10) the order for possession of the land and the declaration that the first appellants were entitled to recover possession of the premises made by the learned Judge should be confirmed and the respondent should deliver vacant possession within three months from the date of the judgment of the Supreme Court. Inquiries on the assessment of damages shall be conducted by the Senior Assistant Registrar of the High Court of Penang who shall then make any award he may think reasonable;

(11) since the respondent was partially successful in the High Court he should be entitled to half the costs in the High Court. The appeal is allowed with costs and the cross-appeal is dismissed with costs.

Cases referred to:

(1) *Inwards* v. *Baker* [1965] 2 Q.B. 29; [1965] 1 All E.R. 446.
(2) *Pascoe* v. *Turner* [1979] 2 All E.R. 945.
(3) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 170.
(4) *Yar Mohamed* v. *Lakshmi Das* A.I.R. 1959 All. 1.
(5) *K.K. Verma* v. *Union of India* A.I.R. 1954 Bom. 358.
(6) *Sidek bin Haji Muhamad & 461 Ors.* v. *Government of State of Perak* [1982] 1 M.L.J. 313.
(7) *Hemmings and Wife* v. *Stoke Poges Golf Club* [1920] 1 K.B. 720.
(8) *Aglionby* v. *Cohen* [1955] 1 Q.B. 558.
(9) *Letchumi Ammal* v. *Nam Fong Housing Sdn. Bhd.* [1982] 2 M.L.J. 19.
(10) *Taunton* v. *Costar* 101 E.R. 1060.
(11) *Newton* v. *Harland* 1 Sc. N.R. 474; 1 Man. & G.
(12) *Rookes* v. *Barnard* [1964] A.C. 1129.
(13) *Bell* v. *Midland Ry. Co.* (1861) 10 C.B.N.S. 287; 142 E.R. 462.

SUPREME COURT.

R.T.S Khoo (*Cecil Abraham and J.A Yeoh* with him) for the appellants.

G.S. Nijar (*Mohideen Abdul Kader and Miss R. Meenakshi* with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The first appellants are the trustees of Leong San Tong Khoo Kongsi (Penang) Registered who are the registered proprietors of the land known as Holding 2532, Mukim 13, N.E.D., Penang and Holding No. 2497, Mukim 13, N.E.D. Penang which collectively constitute what is known as Thean Teik Estate.

The second appellant is a housing developer who had entered into a joint venture agreement with one Golden Star Enterprise, another development company which is not a party in this appeal. The first appellant had executed an agreement with the developer to build houses on Thean Teik Estate for sale to the public. The third appellant is their contractors.

The land concerned has been occupied by farmers who claimed to be tenants of the houses on the land as well as tenants of the vegetable plots. As on January 11 1982 when the third appellant filed a writ in Penang Civil Suit No. 22 of 1982 *inter alia* for an injunction to restrain the occupiers from interfering with development works on the land there were 511 farmers in Thean Teik Estate. The respondent is one of them.

In the agreement executed between them (the 1979 agreement which substituted the 1976 agreement – Vol. IV – 52, 59) it had been agreed between the trustees of Thean Teik Estate and the

developer (clause 4) that the developer shall have the right to enter upon the land to carry out site preparation survey and all other matters connected thereto *including the eviction of squatters* which shall be done at the developer's own expense. It was also agreed that any compensation payable to the squatters shall be borne entirely by the developer provided that the trustees of Thean Teik Estate shall assist the developer in legal proceedings against the squatters.

There were other civil suits relating to the occupation of Thean Teik Estate instituted in the Penang High Court. One such suit was by the trustees of Thean Teik Estate for an injunction to restrain the respondent from further building and expanding illegal structures on the land. Proceedings relating to the injunction was dissolved which according to the first appellant was because of attempts for settlement but which attempts obviously failed.

The respondent testified that on October 26, 1982, at 2.00 p.m. in the afternoon two people from the second appellant's company came to the land and said that they would be coming the following day "to demolish". On the following day, that is October 27, 1982, a group of about 30-40 people came "quite armed and carrying something like starting a fight" with two bulldozers. They then started to demolish the vegetable plots which they unearthed and flattened. In the process they also destroyed pipes for watering the vegetables. According to the respondent's evidence police personnel were also present when the demolition work was going on. The following day, that is October 29, 1982 the people came again at 3.30 p.m. The work of flattening the vegetable plots continued until a female employee of the respondent was shot dead. According to the respondent three acres of his vegetable plots were flattened where he had planted brinjals which were fruiting but not yet harvested.

In his statement of claim the respondent as plaintiff firstly alleged that he has been a registered tenant of the land of approximately six acres in Thean Teik Estate since May 22, 1950 when he bought a farm and a house bearing No. 1026-R in Thean Teik Estate from one Khoo Chai Huat (since deceased) at the price of $1650/-. He became a tenant on May 22, 1950 upon payment of a sum of $5/- whereupon he was registered by the trustees of Thean Teik Estate as tenant. Secondly he also alleged that the first appellant orally promised him that he could stay on the land as long as he continued to pay the rent to the first appellant and he was induced into believing that he could develop the farm as he saw fit. Finally he claimed that the notices to terminate the tenancy of the vegetable plots and the tenancy of the land on which house No. 313 stands are invalid and ineffective and that he is at all material times entitled to the possession of the said land.

There was lengthy trial before the learned judge which lasted for 25 days over a period of 11 months commencing from October 1, 1984 and ending on May 13, 1985. Judgment was delivered on March 10, 1986. The learned judge held that the plaintiff was entitled to damages for trespass and made the following orders:

"1. The defendants to pay the plaintiff by way of special damages $42,000 for the loss of the sprinkler system, the pigsty, the chicken coop and the attap hut and a sum of $135,000 for the loss of vegetable produce on 2 acres of land for 3 years and 9 months at the rate of $3,000 per month.
2. The defendants to pay a sum of $150,000 to the plaintiff as damages for trespass.
3. The defendants' counterclaim for possession of the six acres of vegetable land is allowed.
4. The plaintiff to give up vacant possession of the six acres of land and to dismantle and remove his double storey house together with all the farm buildings which he has built on the land by July 31, 1986."

It is to be noted that orders no. 3 and no. 4 were in favour of the appellants.

It is common ground that there were two tenancies involved, one over the vegetable plots and the other over premises No. 313. The learned judge made several vital findings which are challenged in the appeal.

On the question whether the Control of Rent Act 1966 applies to the tenancy on which the house No. 313 or Municipal No. 1026 stands the learned judge said of the house in his judgment at page 14:

"It is not an unreasonable inference therefore to draw from these two paragraphs that there was in fact no house of whatever type on the six acres of land in April 1950."

On the question whether house No. 313 was built before 1948 he said in his judgment at page 18 as follows:

"I am afraid there is hardly any evidence to find in favour of the plaintiff on this point. I cannot accept the bare word of the plaintiff in the light of other evidence in this case which is against him."

On the notices to quit the learned judge said:-

"The two notices to quit the land and the house dated July 12, 1976 and June 30, 1982 respectively were valid and effective to terminate both tenancies. The 2 months' notice to quit the six acres of vegetable land was in my view not an unreasonable period of time for the plaintiff to harvest his vegetable crop and move out. Nor was the 2 months' notice to quit the house unreasonable notwithstanding the three months mentioned in an agreement between the plaintiff and Khoo Kongsi dated March 4, 1964 (Bundle B page 11) . . Moreover this agreement refers to a plank and attap hut 12' x 20' and not to the larger house No. 1026-R measuring 20' x 40'."

On the question of proprietary or equitable estoppel the learned judge in his judgment said at page 20:-

"In view of all this evidence it seems more probable therefore that the plaintiff was not given any blanket approval by Khoo Kongsi to occupy the land indefinitely and to do as he liked on the six acres of land but that he had to get prior written approval for erecting any structures on the land."

On the question of allegation of trespass the learned judge held at page 22 as follows:

"The defendants do not seriously deny that their men and bulldozers entered and destroyed the vegetable land and some buildings but they contend that they had the right under the common law to remove unauthorised and illegal buildings on their land ...

The plaintiff here is on somewhat stronger grounds against the defendants in his claim for the damage done to his vegetable land and buildings. The plaintiff is not an illegal squatter. He was the lawful tenant of Khoo Kongsi – of the six acres of land and the house – until these tenancies were terminated on July 12, 1976 and June 30, 1982 respectively. Thereafter, Khoo Kongsi was entitled to repossess the land and require the plaintiff to dismantle his house and other buildings and move them out of the land. But this they had to do by due process of the law by obtaining appropriate orders from the court and not by taking the law into their own hands. "A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure." (Section 7 of the Specific Relief Act 1950)."

On the question of damages the learned judge held at page 24 that:

"The plaintiff is entitled to damages for trespass against the defendants whose servants or agents wrongfully and illegally entered his six acres of land and bulldozed the land together with some structures belonging to him. The defendants acted in a very highhanded manner and they ought to be punished with an award of exemplary damages. The common law does not give them any right which they claim so as to disregard the due process of law. The plaintiff is a simple ordinary peasant while the defendants are rich and powerful. But might cannot always be right."

We will now examine these findings.

(1) *Whether the Control of Rent Act 1966 applies*

The appellants claimed that house No. 313 or Municipal No. 1026-R was built after 1948 and the respondent claimed that it was built before 1948. The evidence was conflicting. Looking at the evidence both oral and documentary we have to agree with the learned judge that there is simply not enough evidence to base a conclusion on the balance of probability that the house was built before January 31, 1948 for the Act to apply.

The learned judge referred to two paragraphs in the minutes kept by the trustees of Thean Teik Estate (the Kongsi) dated April 18, 1950 (Vol. III – 446-453) dealing with the taking over of the tenancy from Khoo Chye Huat. The learned judge considered all the evidence before him both oral and documentary and concluded that there was no house on the land as on May 22, 1950. He said at page 15:

"Several maps and plans and even aerial photographs were put in evidence by the parties. I do not intend to go through all these in detail but I must say that on a critical and minute analysis of these documents the probabilities are that there was no house on the six acres of land when the plaintiff bought over the tenancy and registered himself as a ground tenant with the Khoo Kongsi on May 22, 1950. So too with the conflicting oral evidence by the parties on this point. There is more to say for the non-existence of any house as at the relevant date than that there was one."

We do not wish therefore to interfere with the finding of the learned judge.

(2) *The validity or otherwise of the notices to quit*

Two notices to quit are involved here. The first was a notice to quit in respect of the vegetable plots in a letter dated July 12, 1976 (Vol. III – 397) from the Kongsi to the respondent. This letter said that the ground tenancy of the vegetable land would terminate on September 30, 1976. The Kongsi also gave the respondent sufficient time to harvest all vegetable crops in the area and to refrain from further cultivating thenceforth.

The second notice was contained in the letter from the solicitors of the Kongsi to the respondent dated June 30, 1982 (Vol. III – 436). The relevant paragraph in the letter reads as follows:

"As the land on which the abovementioned premises stands is required for development, we are instructed by our clients to give you NOTICE which we hereby do to quit and deliver up vacant possession of the above premises on or before the 31st of July, 1982 or at the end of the term of your tenancy which will expire next after the expiration of one

month from the date of service of this notice on you. Kindly be advised that our clients will no longer require from you the ground rent in respect of the abovementioned premises and other plots if any, with effect from June 1, 1982."

Lengthy arguments were advanced on alleged breaches of municipal building regulations and the Kongsi rules by the extension and renovation purported to have been made to the building but no mention of these breaches were however made in the notice to quit. It would appear that the notice to quit relied solely on the tenancy agreement and the right of the Kongsi to repossession if the land is required for development. It had however been agreed between the Kongsi and the respondent on March 4, 1964 (Vol. III – 385) that in consideration of the Kongsi allowing the respondent to construct a hut "made of planks and attap roof" on the vegetable land rented the respondent agreed *inter alia* –

"(4)To demolish the said hut and any other constructions erected thereon at my own cost and without claiming any compensation whatsoever and to give up possession of the vacant land to the Leong San Tong Khoo Kongsi should I be given three months notice to do so."

Since the tenancy is based on a monthly rental the period of one month's notice would be sufficient to terminate the tenancy. But the 1964 agreement prescribed that a notice of three months would be required for the purpose of demolishing the structure. We therefore agree that both notices to quit are valid.

(3) *Estoppel*

Looking at the evidence particularly the documentary evidence we have no doubt that no estoppel was created proprietary or equitable.

It was argued on behalf of the respondent that there was representation made by the Kongsi that he could expand his farming activities, pig rearing and vegetable gardening and that he could remain on the land indefinitely. The respondent alleged that because he acted on this representation he had developed the farm into the largest if not one of the largest farms in Penang which became a source for the supply of vegetables, poultry etc. in the State. The learned judge clearly rejected that there was estoppel created at any time. In our view the conclusion would be inevitable because of the manner in which Thean Teik Estate was managed and supervised by the Kongsi. Looking at the manner in which the Kongsi managed the Estate throughout the years the creation of any estoppel as alleged would be in our view inconsistent with such management. As an illustration we can see a notice dated March 1, 1941 (Vol. III – 370) from the Kongsi to all owners of houses built in the Estate. This notice prohibited tenants from charging, mortgaging, transferring etc. or making repairs, alterations etc. to their houses without the consent of the Kongsi in writing. Any tenant found infringing any of the conditions set out in the notice would be liable to have the houses demolished after giving three months' notice without compensation.

Again in 1963 we have a notice from the Kongsi to all owners of buildings in the Estate prohibiting them from making any repair or from making any alteration or extension etc. unless prior permission in writing has been obtained from the Kongsi. Failure to observe any of the conditions would render the buildings liable to be demolished at the expense of the owners without compensation (Vol. III – 378).

There is also an undertaking in writing signed by the respondent on June 11, 1968 (Vol. III – 391) as a result of the Kongsi allowing him to plant three poles for installation of lighting to premises No. 313 or No. 1026-R referred to earlier. The respondent undertook to remove the poles when required to do so by the Kongsi and also undertook not to claim any compensation on the new installation "should the said premises be given up for demolition".

The claim of estoppel was based on the allegation of representation and encouragement which led to the respondent expending large sums of money as a result. In both *Inwards* v. *Baker*[1] and *Pascoe* v. *Turner*[2] it was the expenditure of money which raised the equity which provided the estoppel.

The law on this subject has developed so that today the dissenting speech of Lord Kingsdown in *Ramsden* v. *Dyson*[3] would seem to represent the true law followed in *Inwards* v. *Baker*. Lord Kingsdown said:

"The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

In our present case it is really a question of burden of proof. There must first be evidence of representation or encouragement. The respondent took over the land in 1950. In view of the attitude of the Kongsi as expressed in the notices and the running and management of the Estate referred to earlier it is indeed very unlikely that there was any such representation or encouragement that the respondent could expand his farming activities without hindrance.

(4) *The legal status of the parties*

On the expiry of the period specified in the notices to quit referred to earlier and the landlord showing an intention to repossess the respondent became a trespasser on the land. The appellants as landlord could then enter the land to evict the respondent using no more force than necessary to achieve the object. The learned judge held that the appellants' servants or agents wrongfully and illegally entered the land. With respect we disagree. The appellants were well within their rights to enter the land.

It was contended by the respondent and upheld by the learned judge that the appellants must first resort to court action before entering the land. This contention was purportedly based on the construction of sections 7 and 8 of the Specific Relief Act 1950. It was argued by the respondent that the policy of the Specific Relief Act 1950 is to discourage landlords from taking the law into their own hands. Their contention would seem to be supported by the Indian decisions on the corresponding sections of the Indian Specific Relief Act.

Section 7 of our Specific Relief Act 1950 provides that a person entitled to the possession of land *may recover it in the manner prescribed by the law relating to civil procedure.* The corresponding section in the Indian Specific Relief Act is section 8 which however refers to the manner prescribed by the Code of Civil Procedure. Thus the Indian legislation refers specifically to the statute on civil procedure namely the Indian Code of Civil Procedure 1908 but not in the case of our legislation. The manner prescribed by civil procedure law would mean the regular normal process and the ordinary method in instituting civil suits.

Section 8 of our Specific Relief Act provides that if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof notwithstanding any other title that may be set up in the suit. The corresponding provision in the Indian law is section 9 of the Indian Specific Relief Act. According to the Indian interpretation the legislature has laid down in section 9 of their Specific Relief Act, a provision of law for the removal of any one who has dispossessed another otherwise than in due course of law. The dispossession may have been peaceable or otherwise. The object of the legislation they say is to draw persons who wish to eject a person from their land into the proper court and to prevent landlords from acting in a high handed manner. The plain object they conclude is to discourage proceedings calculated to lead to serious breaches of the peace.

Mr. Lal Mohan Mukhopadhyaya, in his book entitled "Indian Case Law on Ejectment" Ed.2, page 556, summarizes the objects of the Indian provision:

"(1) To prevent any one from taking possession violently or without the consent of the party in possession or otherwise than in due course of law.

(2) To protect possession and to discourage people from taking the law into their own hands and thereby deriving any benefit.

(3) To prevent the shifting of the burden of proof.

(4) To provide a special summary and speedy remedy for a person who being, whatever his title may be, in possession of immoveable property, is illegally ousted therefrom without his will and consent.

(5) To discourage proceedings calculated to lead to serious breaches of the peace and to provide against the person who has taken the law into his own hands deriving any benefit from the process."

The Indian position is therefore as follows. Although a landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over he may not dispossess him without the aid of the courts. If he does so it is competent for the tenant to sue the landlord for possession. See the commentaries in Pollock & Mulla. 9th Ed., page 816 and the cases cited therein. We are unable to fathom the logic of the Indian decisions. In *Yar Mohd.* v. *Lakshmi Das*[4] the Allahabad Full Bench considered the scope and object of section 9 of the Indian Specific Relief Act and Srivastava J. delivering the judgment said at page 5 –

"A suit under section 9 of the Specific Relief Act is however an entirely different kind of action. That section gives a special privilege to persons in possession who take action

promptly. In case they are dispossessed it entitles them to succeed simply by proving

(1) that they were in possession,

(2) that they have been dispossessed by the defendant,

(3) that the dispossession is not in accordance with law, and

(4) that the dispossession took place within six months of the suit.

No question of title either of the plaintiff or of the defendant can be raised or gone into in that case. The plaintiff will be entitled to succeed without proving any title on which he can fall back upon and the defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is however always subject to a regular title suit and the person who has the real title or even the better title cannot therefore be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession."

In *K.K. Verma* v. *Union of India*[5] the appellate court rejected the argument of counsel for the respondent and held that the position in English law was unnecessary to be considered because the law in India was different for under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. According to our legislation this statement of the learned Chief Justice of the Bombay High Court would be true only in respect of a tenancy of protected premises under the Control of Rent Act 1966.

We view sections 7 and 8 of our Specific Relief Act differently. In the context of the provision of section 7 the word "may" is permissive and discretionary and it is not obligatory on the part of a person entitled to the possession of land to resort exclusively or solely to a court of law. In other words section 7 of the Specific Relief Act 1950 does not exclude the common law remedy of self-help. This is a remedy which is always available unless expressly excluded. This remedy was referred to in *Sidek bin Haji Muhamad & 461 Ors.* v. *The Government of the State of Perak.*[6] The difference there was that the Federal Court then was dealing with trespassers *ab initio* namely squatters who went into possession of an unalienated state land contrary to the National Land Code and refused to leave when ordered to do so by the State Governement. They then filed a writ asking for a declaration that they were entitled in law and in equity to be in possession of their respective lots in the land "originally pioneered, opened up and occupied by them." The Federal Court held that an owner of land is not obliged to go to the courts to obtain an order of possession. He is entitled, if he so wishes, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts. He can even use force, so long as he uses no more force than is reasonably necessary. He will not then be liable either criminally or civilly. This however is not to be encouraged because of the disturbance which might follow but the legality of it is beyond question.

The Federal Court in that case also referred to *Hemmings* v. *Stoke Poges Golf Club.*[7] *Hemmings* is closer to our case in that the original entry was lawful but on the expiration of the notice to quit the tenants refused to leave as in this case. Thereupon on the instruction of the defendant several persons entered the cottage and removed Hemmings and his wife and their furniture using no more force than was necessary for the purpose. In that case the wife refused to leave the house voluntarily and was carried sitting on the sofa and placed outside the cottage. Subsequently Hemmings brought an action to recover damages for forcible entry and for assault. The trial judge gave no damages for the actual eviction but gave 20 guineas damages for the assaults on Mr. & Mrs. Hemmings and the damage to the furniture. However the judge found that no force was used beyond that which was actually necessary for the purpose of ejecting the plaintiffs. The infringement by the defendants alleged was against an old statute which enacted that a forcible entry is a criminal offence. The trial judge gave judgment for the plaintiff and ordered damages but indicated however that had he not considered himself bound by authority he would have held that the action by Hemmings was not maintainable.

In the Court of Appeal judgment was entered for the defendants. Bankes L.J. in his judgment said that the defendants were undoubtedly entitled to possession of the cottage and the plaintiffs had no right to remain there and even assuming that the entry by the defendants were a forcible entry the right to possession was in the defendants.

On the question of self-help Bankes L.J. said at page 737:

"I have no fear that the present decision will encourage lawlessness as was suggested for the respondent. A person who makes a forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself also to the civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods."

Scrutton L.J. at page 738 held that the action of the defendants were carried out with no force than was necessary to remove the occupiers. He said:

"They entered without any disturbance or violence. Mr. and Mrs. Hemmings declined to leave. Thereupon they carried Mrs. Hemmings out sitting in a chair. They led Mr. Hemmings out. They carried the furniture out and put it in a garage with one side open to the weather. The weather was showery, and part of the furniture was wet. All these operations were carried out with no more force than was necessary to remove people who did not actively resist but declined to go unless carried."

At the end of the judgment at page 747 Scrutton L.J. made the following remarks on the alleged right of trespassers to recover damages against the true owner:

"But I see no reason to add to the existing privileges of trespassers on property which does not belong to them by allowing them to recover damages against the true owner entitled to possession who uses a reasonable amount of force to turn them out."

In *Aglionby* v. *Cohen*[8] the landlord had obtained judgment in default but the defendant continued to occupy the premises. The landlord without calling in the help of the sheriff, put the defendant's chattels outside the premises and obtained possession. It was held that notwithstanding that the landlord had invoked the law and obtained judgment for possession, he had not lost his common law right and was entitled in the circumstances to enter the premises as he did. Harman J. (as he then was) said at page 562:

"Therefore, the plaintiff was entitled to sue out his writ for possession, but he did not do that. He chose to take the law into his own hands and to enter himself. It has been well known to be the law ever since the celebrated case of *Hemmings* v. *Stoke Poges Golf Club*, that if no more force be used than is necessary a man may turn a trespasser off his property and put his chattels out of the house."

Our courts have consistently subscribed to the principle that one who has the right to enter upon another's land and act in excess of this right or after his right has expired is a trespasser – see *Sidek bin Hj. Muhamad* and *Letchumi Ammal* v. *Nam Fong Housing Sdn. Bhd.*[9] Both these cases were decided by the former Federal Court and both appeals were heard about the same time by different quorums in early February and March 1982.

Sections 7 and 8 of our Specific Relief Act should be read conjunctively. Section 8(1) of the Act clearly implies the remedy of self-help. Section 8(1) presupposes a person entitled to possession but is dispossessed contrary to his rights. It is understood that the landlord if he recovers possession otherwise than by the normal process of court action opens himself to the risk of being sued by the person dispossessed. That is the risk he must take.

In passing we might add however that our Specific Relief Act 1950 is not identical with or similar to the English Rent Act 1965 or the English Protection from Eviction Act 1977 which has deprived the landowner of his common law right to recover possession, and his right of re-entry without a court order. The Criminal Law Act 1977 repealed the old forcible entry statutes.

(5) *Can the respondent recover damages?*

Based on the facts as found by the learned judge there can be no trespass on the land by the appellants and there can be no damages for forcible entry as such. See also *Taunton* v. *Costar.*[10] Although no rights of the respondent had been infringed by the forcible entry of the land by the appellants using no more force than was necessary to achieve the object, the respondent would be entitled to the payment of damages if any injury has been sustained by him for which he could be entitled to compensation in damages. Authority for this proposition can also be found in the judgment of Bankes L.J. in *Hemmings and Wife* v. *Stoke Poges Golf Club* at page 733 where he approved what was said by Erskine J. in *Newton* v. *Harland*[11] when referring to the old statute on forcible entry:

"For, although the law had been violated by the defendant, for which he was liable to be punished under a criminal prosecution, no right of the plaintiff had been infringed, and *no injury had been sustained by him for which he could be entitled to compensation in damages.*"

and at page 737:

"A person who makes forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself also to the civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods."

In other words the respondent cannot recover damages for the forcible entry but he can recover damages for the destruction of his property by the action of the appellants or their agents which went beyond what was necessary to effect repossession.

According to the respondent's evidence which was unchallenged, the appellants' agents came to the land on October 27, 1982, with two bulldozers and started to demolish the vegetable plots. They unearthed the vegetable plots and on the first day alone destroyed more than one acre of the vegetable land. The pipes laid by the respondent to water the vegetable plants were rendered useless after the demolition. On October 29, 1982, the people again came and flattened his farm. As a whole according to the respondent three acres of his farm were flattened. Brinjals which were fruiting but not harvested were destroyed. The learned judge, after his visit to the scene, found that the respondent's claim for $20,000/- for the loss of the sprinkler system, $10,000/- each for the loss of pigsties and chicken coop and $2,000/- for the loss of one attap house not unreasonable. From the evidence it would seem undisputable that the buildings or erections were illegal structures and the claims were not for loss of pigs or chickens. Accordingly we affirm only the award for the loss of the sprinkler system which amounts to $20,000/-.

As regards the damages awarded for loss of revenue from the vegetables, the learned judge made the calculation that the loss was $3,000/- per month for a period of 3 years 9 months amounting to $135,000/-. Since the tenancy over the vegetable plots had been validly terminated it would seem fair to assume that after the expiry of the notice to quit the respondent continued with the cultivation of the farm at his own risk. It is our view that a straight award is the only reasonable thing to do. But what is the amount of the straight award? The learned judge did not elaborate on how he arrived at the figure of $3,000/- per month revenue. He could have been influenced by the evidence of the respondent at pages 21 and 22 of Vol. II and the evidence of the university lecturer (PW4), especially at page 194 of Vol. II. The figure $3,000/- per month as revenue from the vegetable produce has no proper basis considering the respondent's own evidence on his income tax returns for the years of assessment 1981, 1982, 1983 and 1984. His evidence is to be found at pages 161 and 162 of Vol. II which shows that for the year of assessment 1981 income declared was $13,000/- and tax paid was $890/-: for year of assessment 1982 income declared was $14,000/- and tax paid was $975/-: for year of assessment 1983 income declared was $18,000/-, and tax paid was $1,810/-: and for year of assessment 1984 income declared was $16,000/- and tax paid was $1,630/-. The respondent said in his evidence that what he declared to the Income Tax Department was the truth. Having regard also to the fact that the respondent himself said in evidence at page 59, Vol. II that he took over the land so that he could expand activities of pig rearing, poultry farming and vegetable gardening we would assess his probable income from vegetable farming in the region of $1,000/- per month at the highest. Since crops are normally harvested in stages we accordingly make a straight award of $3,000/- for loss of the three acres of vegetable crops.

The award for damages for trespass ordered by the judge is set aside.

The award for exemplary damages by the learned judge was misconceived and is set aside. Before *Rookes* v. *Barnard*[12] a clear pronouncement on exemplary damages was made in *Bell* v. *Midland Ry. Co.*[13] by Willes J.:

> "I must say, that, if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand and in plain violation of an Act of Parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves. If it were necessary to cite any such a position, it will be found in the case of *Emblen* v. *Myers* (1860) 6 H & N 54) which I cite only for illustration."

The object of exemplary damages prior to *Rookes* v. *Barnard* is to punish a tortfeasor for his conscious wrong doing in contumelious disregard of another's rights. It is quite clear however that the appellants in this case acted partly on the advice of the municipal authority. This can be seen clearly from the affidavit of Khoo Kah Seng, secretary of the Kongsi affirmed on January 24, 1984, wherein he deposed:

> "I wish to bring to the attention of this Honourable Court that as early as May, 1976 the 1st defendants had sought the assistance of the Pengarah Bangunan-Bangunan, Majlis Perbandaran Pulau Pinang to discourage their ground tenants and squatters from making unauthorised buildings and outhouses on their land. A copy of a letter dated May 17, 1976 addressed to the Majlis Perbandaran Pulau Pinang is annexed herewith as exhibit marked 'KKS-13'. I am advised and verily believe that following the decisions of the Federal Court in the case of *Sidek bin Hj. Muhamad and 461 others against the Government of the State of Perak*, Civil Appeal No. 115 of 1981 and also in the case of *Letchumi Ammal d/o Chellapa* v. *Nam Fong Housing Sdn. Bhd.*, Civil Appeal No. 107 of 1980, the Majlis Perbandaran Pulau Pinang have appeared reluctant to remove illegal buildings and have instead advised that actions to remove illegal buildings and structures could well be taken by the landowners themselves following the Judgment of the Federal Court. A copy of a letter dated February 15, 1982 from the Majlis Perbandaran Pulau Pinang is annexed herewith as exhibit marked 'KKS-14'."

Therefore the conduct of the appellants may have

exceeded the bounds of peaceable entry but cannot in the circumstances be described as a reprehensible conduct or a contumelious disregard of the respondent's rights.

(6) *The appellants' counterclaim*

In the court below the appellants had counterclaimed for a number of orders and declarations. Firstly the appellants asked for a declaration that the tenancy over the vegetable plots is not a tenancy subject to the Control of Rent Act 1966 nor a tenancy coupled with an equitable interest. In our view this declaration should be granted and we so declare.

Secondly the appellants asked for an order of possession of the vegetable land, six acres in area, which the learned judge in fact granted and which order we now affirm.

Thirdly the appellants also asked for a declaration that they be entitled to recover possession of house No. 1026-R in Thean Teik Estate including the double-storey annexe dwelling house and also the utility-cum-hatchery-cum-storage house in the immediate vicinity on the expiry of such reasonable notice not exceeding three months. This counterclaim was later amended into an order of possession of the premises and a declaration that the first appellants be entitled to recover possession of the premises *etc.* Both the order and the declaration should be granted and we order accordingly

We also order the respondent to deliver vacant possession within three months from the date hereof.

The counterclaim for exemplary damages was abandoned which now leaves us with counterclaims No. (iii), (iv), (v) and (vii) (Vol. 1 – 42-43). These are:

"(iii) An assessment of damages or mesne profits in respect of the letting value of 2.5 acres of vegetable land converted into a poultry and pig farm from September, 1978 until delivery of possession.

(iv) Damages for trespass and/or an inquiry as to the extent or an account of the profits gained by the plaintiff in converting 2.5 acres of the said vegetable land into a poultry and pig farm from September, 1978 until delivery of possession.

(v) As assessment of damages suffered by the defendants since April 1982 in being deprived of the use of the vegetable land for development since the approval of building and layout plans for 6 blocks of 5 storey walk-up flats.

(vii) An assessment of damages or mesne profits in respect of the letting value of the land occupied by the double-storey annexe dwelling house and a utility cum hatchery cum storage house covering approximately a total built-up area of 4,450 sq. ft. from September, 1978 until delivery of possession."

In the event of the failure of a tenant to deliver up vacant possession the measure of damages is not the value of the land but the real damage sustained by the landlord. Under section 28(4) (a) of the Civil Law Act 1956 every tenant holding over after the determination of his tenancy shall be chargeable, at the option of the landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

In view of the foregoing we direct that enquiries on the assessment of damages referred to in paragraphs (iii), (iv), (v) and (vii) of the counterclaim shall be conducted by the Senior Assistant Registrar of the High Court Penang who shall then make any award he may think reasonable.

(7) *The respondent's cross-appeal*

The respondent challenged the various findings of the learned judge. One of the main points raised was on the question of the application of the Control of Rent Act 1966 on premises No. 313 or Municipal No. 1026-R. Lengthy submissions by both counsel were made before the learned judge and also before this court. The question of fact was when was the premises erected before or after 1948? It should be borne in mind that the learned judge had the opportunity of observing the witnesses and he then clearly came down on the side of the appellants' witnesses. In view of a clear finding of this nature we do not wish to interfere on this point.

It is also clear that there are two tenancies involved in this case, one in respect of the vegetable land and the other in respect of the premises No. 313. We also agree that ground tenancy of the six acres of land cannot have the protection of the Control of Rent Act.

We have already held that there was no estoppel proprietary or equitable involved in the tenancy at any time.

As regards the two notices to quit the learned judge had considered both notices and held the notices to be valid and effective. We have come to the same conclusion but on somewhat different grounds.

Finally, the question of inadequacy of damages awarded by the learned judge for the loss of revenue from the vegetables. We have already dealt with this point earlier in the judgment.

In view of the foregoing the respondent's cross-appeal is accordingly dismissed.

(8) *Costs*

The learned judge made his order on costs as follows:

"Costs. In the exercise of my discretion I award full costs of the proceedings – claim and counterclaim – to the plaintiff having taken into account all the circumstances of the case including the conduct of the defendants in the manner they went about to gain possession of the six acres of land."

With respect we feel that the basis of the order of the learned judge is not quite correct and cannot be sustained. The main issues before the learned judge were in fact decided in favour of the appellants. It is contended here on behalf of the appellants that the order of possession in respect of the six acres of land and the house granted by the learned judge (orders no. 3 and 4 referred to earlier) would in effect mean that the appellants had successfully maintained their legal rights against the respondent and therefore entitled to costs as of right. In reality however the respondent was in fact successful only in part of his claims.

Since the respondent was partially successful in the High Court he should therefore be entitled to half the costs in the High Court. We accordingly vary the order of the learned judge with the order that the respondent be awarded only half of his costs in the court below.

The appeal is allowed with costs and the cross-appeal is dismissed with costs.

Deposit to be refunded to the appellants.

Appeal allowed, cross-appeal dismissed.

Solicitors: *Shearn Delamore & Co. ; Syarikat Mohideen Abdul Kader.*

LIM KHOO EONG v. TRUSTEES OF LEONG SAN TONG KHOO KONGSI (PENANG) REGISTERED & 2 ORS.

[O.C.J. (Edgar Joseph Jr.) February 3, 6, 12, 17, 19 & March 7, 1986]

[Penang – Suit No. 22-3-86]

Landlord and Tenant – Tenancy of land under expectation of stay as long as tenant wishes - Improvement to dwelling and farming plots by tenant – Development of land by defendants – Dispute – Interlocutory injunction against defendants – Application by defendants to discharge injunction – Whether should be granted – Balance of convenience – Damages – Street, Drainage and Building Act, 1974, s.9 – Specific Relief (Malay States) Act, 1950 (Revised 1974), ss. 7 & 8(1).

The plaintiff is in possession of a vegetable plot of land on which there is a farm measuring about 2 acres forming part of the land known as Holding 2532, Mukim 13, North East District, Penang. The first defendants ("D1") are the registered proprietors of the land. The substituted second defendant ("D2"), Perumahan Farlim (Malaysia) Sdn. Bhd., is the developer charged with the responsibility of developing the land on behalf of D1. The 3rd defendant, Thean Tatt Construction Sdn. Bhd. ("D3"), is the building contractor whose task is to carry out the actual work involved in the development.

The history of the case goes back to prior to the Japanese Occupation of Malaya when the plaintiff's father, one Lim Ah Khim, deceased, who died in 1962, rented from D1 the vegetable plot for vegetable farming and another plot for building a dwelling house, both comprised in the land concerned. The deceased constructed a dwelling house on the building plot and cultivated vegetables and reared pigs on the vegetable plot with a view to profit. It was said that as a result of a belief induced by D1 that the deceased and his family (including the plaintiff and his brother) could stay on the vegetable and building plots and carry on their farming activities for as long as they wished, subject to payment of a nominal rent and keeping the land under cultivation, they expended a substantial sum of money and labour in building and improving the dwelling house and they converted what was once a jungle into a fertile farm. The deceased gave one portion of the farm to the plaintiff and the other portion to his brother. The deceased also gave the dwelling house to the plaintiff, who, after the death of the deceased, was registered by D1 as a tenant of the dwelling house at a monthly rental of $7 which D1 duly received.

The present dispute arose when D1 had proceeded with their plans for development of the land concerned in disregard of the legal fights of the plaintiff concerning the vegetable and building plots. He feared that unless restrained by injunction the defendants would wrongfully enter and take forcible possession of part of his farm, thereby causing irreparable loss or damage to him. He therefore applied for and obtained an interlocutory prohibitory injunction against the defendants. The defendants applied to discharge the *ex parte* injunction but later modified the application to that of limiting the injunction's operation.